TETUAN JAFFAR & MENON

v.

SENANDUNG KUALITI SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S1-22-1211-2002]
25 NOVEMBER 2004

CIVIL PROCEDURE: *Costs - Bill of costs - Application for taxation - Non-contentious business - Whether application under s. 121(1)(b) Legal Profession Act 1976 applied to non-contentious business - Whether s. 113(6) allows for non-contentious business under s. 121 - Whether application filed within one month of service of writ proper*

This was an appeal by the plaintiff against the decision of the senior assistant registrar who allowed the 1st defendant's application to have the plaintiff's bill of costs taxed under s. 121(1)(b) of the Legal Profession Act 1976 ('LPA'). The plaintiff claimed that the subject matter in the bill of costs was a non-contentious business and as such s. 121(1)(b) LPA was inapplicable. The applicable provision was s. 126(1) LPA but the 1st defendant was time barred to seek redress under the said provision as the stipulated period of six months had passed. Further, an application for enlargement of time under s. 128(1) LPA could not be made as time had run out. Against this, the 1st defendant argued that s. 113(6) LPA allowed s. 121(1)(b) LPA to be utilized for non-contentious business. Therefore, its application within one month after the service of the writ by the plaintiff complied with s. 121(1)(b) LPA.

Held (dismissing the appeal):

[1] Section s. 121 LPA governs taxation of a bill of costs concerning contentious business and s. 113 LPA relates to non-contentious business. However, with the inclusion of the phrase "subject to section 121" in s. 113(6) LPA, taxation of non-contentious business must be subjected to s. 121 LPA. This means that the remedy to recover remuneration is conditional upon the application of s. 121 LPA. Applying this interpretation, the 1st defendant was well within the time frame under s. 121(1)(b) LPA. (p 240 b-e)

Case(s) referred to:
John Ang & Jega v. Kulasingam Sinatamby [2001] 2 CLJ 198 HC ***(refd)***
Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd [1998] 2 CLJ 797 FC ***(foll)***
Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co [1995] 3 CLJ 234 HC ***(refd)***
Phuah Choon Hwang & Anor v. Hassan & Kong Yeam [1986] 1 CLJ 513 HC ***(refd)***
Re A Solicitor [1956] 1 QB 155 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 113(4), (6), 121(1)(b), 126(1), 128(1)

Solicitors Act 1932 [UK], s. 57

For the plaintiff - GK Ganesan (Azrina Sabtu); M/s GK Ganesan Saiful & Rokiah
For the defendant - FM Wong; M/s Chee Siah Le Kee & Partners

Reported by Usha Thiagarajah

JUDGMENT

James Foong J:

Introduction

Enclosure 12 is the application of the 1st defendant to:

(a) have the plaintiff's bill of cost taxed under s. 121(1)(b) of the Legal Profession Act 1976 (LPA);

(b) and that all proceedings in this case be stayed pending the taxation of the bill of cost.

When this application came before the senior assistant registrar, she allowed it leading to this appeal to judge in chambers (encl. 44).

Background

The plaintiff is a firm of advocates and solicitors. The 1st defendant was its client. The 1st defendant had instructed the plaintiff to prepare a joint venture agreement for a certain project. After services rendered the plaintiff delivered to the 1st defendant on 19 October 2000 a bill of cost for a sum of RM404,046.89. Considering this to be too exorbitant, the 1st defendant offered, some nine months after the delivery of the said bill, a sum of RM20,000. The plaintiff rejected this. And still receiving no payment from the 1st defendant, the plaintiff proceeded to file this action on 10 October 2002 to recover the sum mentioned in the bill of cost.

After accepting service of the writ, the 1st defendant entered appearance, followed by defence as well as encl. 12.

1st Defendant's Approach

According to the 1st defendant, s. 121(1) of the LPA provides that:

> 121(1) Where the remuneration of an advocate and solicitor in respect of contentious business done by him is not the subject of an agreement made pursuant to section 116, the solicitor's bill of costs may at the option of the advocate and solicitor either contain detailed items or be for a gross sum:
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> Provided that
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> (a) at the time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum and before the expiration of three months from the date of delivery to him of the bill, the party chargeable therewith may require the advocate and solicitor to deliver to him in lieu of the cost a bill containing detailed items, and the gross sum bill shall thereupon one of no effect;
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> (b) where an action is commenced on a gross sum bill, the Court shall, if so requested by the party chargeable therewith before the expiration of one month from the service on that party of the writ or other originating process, order that the bill shall be taxed.
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> (c) (not relevant to this case).

By virtue of this provision, the 1st defendant requests this court to tax the bill of cost of the plaintiff since the 1st defendant is well within the period of one month after service of the writ to make this application.

Plaintiff's Contention

The plaintiff does not agree with this view. It points out that s. 121(1)(b) LPA deals with bill of cost related to "contentious business". As the subject matter in the bill of cost relates to drafting of an agreement, which is non-contentious business, then s. 121(1)(b) LPA does not apply. If at all, the 1st defendant desired to have the bill of cost taxed, the 1st defendant should have proceeded under s. 126 (1) LPA which reads:

> An order for the taxation of a bill of cost delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.

But the plaintiff submits that time has run out on the 1st defendant to seek such redress under this provision since the bill of cost was delivered to the 1st defendant on or about 19 October 2000, and this application to tax the bill of cost (encl. 12) was filed some two years after the delivery of the bill of cost. Going by the calculation of the plaintiff the stipulated period of six months to make such application under s. 126(1) LPA has passed.

Of course there is the provision under s. 128(1) LPA, which allows enlargement of time to make such application. But this, according to the plaintiff, is subjected to the following conditions:

> After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the Court.

which are not complied with by the 1st defendant ie, the 1st defendant has neither given notice of its intention to make such an application, nor presented special circumstances to support such application. In addition, time to make such application has run out on the 1st defendant since s. 128(2) LPA demands:

> No such order for taxation shall be in any event be made after the expiry of one year from the delivery of the bill of costs.

In short, the plaintiff maintains that the 1st defendant is time barred from taxing the bill of cost.

1st Defendant's Counter Argument

Though conceding that the bill of cost relates to non-contentious business, and that s. 121(1)(b) LPA applies only to contentious matter but the 1st defendant argues that there is s. 113(6) LPA which allows the 1st defendant to utilize s. 121(1)(b) LPA to request taxation of the plaintiff's bill of cost on non contentious matters within the existing time frame of this case.

To appreciate s. 113(6) LPA it is necessary to be enlightened on the purpose and function of s. 113 LPA. Generally, s. 113 LPA deals with the formation, operation and scope of duties of a Solicitors Costs Committee. This committee regulates and sets down remunerations of advocates and solicitors for work and services rendered on non-contentious business. This committee prescribes scale fees or percentages for various types of work undertaken by advocates and solicitors after taking into account various considerations set out in s. 113(4) of the same Act. For a solicitor to recover non-payment of such remunerations, s. 113(6) LPA spells out the process:

> So long as an order made under this section is in operation, taxation of bills of costs of advocates and solicitors in respect of non-contentious business shall, **subject to section 121**, be regulated by that order. (emphasis added).

By hanging on to the words "subject to s. 121" in s. 113(6) LPA, the 1st defendant maintains that the 1st defendant not only can make such request but is also within the time frame allowed to do so which is one months from date of service of the writ on the 1st defendant by the plaintiff.

Analysis

From the arguments and approach presented the main issue of this appeal centers on whether: the procedure prescribed in s. 121 LPA applies to non-contentious matters governed under s. 113 LPA.

At the outset, what is obvious is that s. 121(1) LPA explicitly refers to "contentious business", and s. 113 LPA expressly deals with non-contentious matters. Yet included in s. 113(6) LPA is this phase "subject to s. 121". Thus, this calls for a determination of the meaning of this phase to ascertain the intention and aspiration of the legislature for its inclusion. Indirectly, this court is asked to determine whether the facility under s. 121(1)(b) LPA applies to non-contentious business ascribed by s. 113 LPA.

A number of cases associated with taxation of the bill of cost are cited during submissions from both sides intended to influence me to their respective point of view. Though many of these cases involve bill of cost, but they are of little assistance to settle the issue at hand. For instance, the case of *Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co* [1995] 3 CLJ 234 concerns s. 126 LPA. Section 126 LPA allows a party, either the advocate or solicitor or the party chargeable with the bill of cost, to request for taxation within a certain specific time. In our situation, the 1st defendant upon realizing that it is out of time to proceed under this provision seeks an alternative route under s. 113(6) LPA. The same goes for the case of *John Ang & Jega (suing as a firm) v. Kulasingam a/l Sinatamby* [2001] 2 CLJ 198 except that this case also attempts to reconcile a bill of cost for a gross sum with a bill of cost containing detailed items under s. 121 LPA. Then in *Phuah Choon Hwang & Anor. v. Hassan & Kong Yeam* [1986] 1 CLJ 513; [1986] CLJ (Rep) 579, the discussion centers on the inherent jurisdiction of the court to enlarge time to tax a bill of cost, which, in the instant case, is not even requested for by the 1st defendant.

But what I find more relevant and helpful, are cases that attempt to define the words "subject to". The first is the Federal Court decision of *Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd* [1998] 2 CLJ 797 which says that:

> **'subject to'** should be given the same meaning as that given by Neal J in his dissenting judgment in *Government of the Federation of Malaya v. Surinder Singh Kanda* [1961] 27 MLJ 121, a meaning endorsed on appeal to the Privy Council by Lord Denning (see [1962] 28 MLJ 169 171). In that case Neal J when considering the meaning of the words "subject to the provisions of any existing law" in art. 144(1) of the Federal Constitution said at p. 138 col. 2B:
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> > I have come to the conclusion that the meaning which reading the Constitution as an entirety and having regard to the consideration of what is happening on the granting of a fresh Constitution, I ought to give to the words, "subject to," is following Denman CJ **"Subject to the procedural limitations of,"** or alternatively to follow the wording of Lord Simonds in Smith's case and to say the jurisdiction is given to be exercised **"within the restrictions or limitations imposed by,"** and this meaning is well within the limits of the range of meanings given to the words "subject to," by the Courts throughout the British Commonwealth; ...
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> So, also, in the Canadian case of *Massey-Harris Co. v. Straburg* [1941] 4 DLR 620, MacDonald JA put the point simply but clearly when he said (at p. 622):
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> > (When) a provision in a statute is **'subject to' another provision requiring something to be done, the first provision is conditional upon the performance of what is required by the provision referred to** (emphasis added).

Another case of assistance, though not directly on point but associated with taxation of a bill of cost is *Re A Solicitor* [1956] 1 QB 155. It concerns a firm of solicitors having carried out some conveyancing work for a client applies for its bill to be taxed but met with a claim that there exist an oral agreement for an amount less than the prescribed scale fee. On whether the client can rely on the alleged oral agreement of a pre-agreed fee, which was not in writing, as is required under s. 57 of the English Solicitors Act 1932 to be effective and enforceable, the court announced:

> As long as any order under this section is in operation, the taxation of bills of costs of solicitors shall, subject to the provisions of the next succeeding section with respect to agreements as to remuneration, be regulated by that order. Therefore, when a bill of costs in regard to non-contentious business is being taxed it must be taxed in accordance with the scale, subject only to the provisions of the next succeeding section with respect to agreements as to

> remuneration; so I think it must follow that, if an agreement as to remuneration does not comply with the requirements of s. 57, then it does not displace this provision in section s. 56(7) ... Under s. 56(7), the scale must be applied subject to the provisions of s. 57, and the meaning of s. 57(3) is that an agreement between a solicitor and his client with regard to the amount of charges must be in writing in order to have the effect which is referred to in s. 56(7), that is to say, in order to displace the scale. The scale in the present case under consideration was not displaced, because no agreement in writing was made.

Having considered these propositions, I am of the view that the phase "subject to s. 121" in s. 113(6) LPA permits the 1st defendant to apply for taxation of the bill of cost under s. 121(1)(b) LPA on non-contentious business ascribed under s. 113 LPA. Though s. 121 LPA governs taxation of a bill of cost concerning matters that are contentious and s. 113 LPA relates to non-contentious business but with the inclusion of the phase "subject to" in s. 113(6) LPA it means that taxation of non-contentious business ascribed by the order of the Solicitors Costs Committee under s. 113 LPA must be subjected to another provision or procedural limitation for implementation. And the selected provision to facilitate this is s. 121 LPA. This means that for remedy to recover remuneration ascribed by the Solicitors Cost Committee is conditional upon the application of s. 121 LPA.

Applying this interpretation to the existing circumstances, then the 1st defendant is well within time under s. 121(1)(b) LPA to request this court to have the plaintiff's bill of cost taxed.

Conclusion

With these I hereby dismiss this appeal with cost.